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No. 88-1770

IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

WESTINGHOUSE ELECTRIC CORPORATION,
Petitioner,
v.
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF FOR THE NATIONAL PUBLIC EMPLOYER LABOR RELATIONS ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF THE PETITION

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QUESTION PRESENTED

Whether § 4(a)(1) of the Age Discrimination in Employment Act of 1967 ("ADEA"), 29 U.S.C. § 623(a)(1), precludes representatives of an employer and union from bargaining for, and agreeing to, a post-employment income maintenance program which provides retirement-eligible employees with more valuable early retirement benefits or less valuable severance payments, but not both.

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BRIEF FOR THE NATIONAL PUBLIC EMPLOYER LABOR RELATIONS ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF THE PETITION

INTEREST OF THE AMICUS[1]

The National Public Employer Labor Relations Association ("NPELRA"), a non-profit association organized under the laws of Illinois, represents more than 2,000 labor relations and personnel professionals who work on behalf of states, counties, cities, and special governmental districts throughout the United States. These individuals have responsibility directly or indirectly for labor and employment decisions affecting in excess of 2.5 million public employees.

[1] Counsel for both parties have consented to the filing of this amicus brief.

Many governmental entities maintain, and many of NPELRA's members are involved in administering, regular and early retirement plans and other types of employee benefit plans. Some of these benefit plans are negotiated with representatives of employee groups or may be affected by collective bargaining agreements; others are created by state and or local law and regulation. Thus, the resolution of the issue presented in this case—involving whether § 4(a)(1) of the ADEA, 29 U.S.C. § 623(a)(1), makes unlawful a post-employment benefit plan which provides retirement-eligible employees with either more valuable early retirement benefits or less valuable severance payments, but not both—and its impact on the stability of collectively bargained retirement/severance programs are of significant interest to NPELRA and its members.

STATEMENT

1. Petitioner, Westinghouse Electric Corporation ("Westinghouse"), provides a multi-faceted post-employment income maintenance program to its employees. Pet. App. at 8a-13a. Under the program in effect between 1979 and 1985, employees who satisfied certain eligibility requirements—relating to age, years of service, and circumstances of termination—could immediately begin receiving lifetime retirement benefits upon the termination of their employment with Westinghouse. *Id.* at 8a-13a.[2] Employees who did not satisfy these eligibility requirements, or who chose not to receive such immediate lifetime retirement benefits, could, upon their termination, receive less valuable post-employment benefits—specifically, deferred retirement benefits and, where the termination was through no fault of their own, immediate short-term layoff and income benefits ("LIB"). *Id.* at

[2] These lifetime retirement benefits included immediate monthly pension benefits for life; monthly pension supplements until the onset of Social Security benefits; and lifetime insurance benefits. *See* Pet. App. at 23a.

9a-13a. Westinghouse established these retirement and LIB provisions through negotiations with its employees' collective bargaining representatives;[3] it did so on the understanding that employees would be eligible for LIB (and deferred pension benefits) only if they were ineligible for, or chose not to receive, the more valuable, immediate lifetime retirement benefits. Pet. App. at 8a-13a; J.A. 515, 534-36, 1272-80, 1302-06.

Westinghouse and its employees' collective bargaining representatives first linked the provision of immediate retirement benefits and LIB in their 1960 negotiations. J.A. 568a, 534-36, 1409-10. In 1960, they negotiated a Pension and Insurance Agreement ("P&I Agreement") that provided immediate "early" retirement benefits to those employees who, at the time of their separation, were at least 60 years of age and had at least ten years of service. J.A. 1785-86, 1792, 1794, 1798. At the same time, Westinghouse agreed to add an LIB component to the P&I Agreement: this LIB component provided for a cash payment—equal to one week's pay per year of service—to those employees who, when terminated through no fault of their own, were ineligible for immediate retirement benefits. J.A. 534-35, 1409-10.

With this linkage between immediate retirement benefits and LIB in place, Westinghouse and its employees' unions in their subsequent negotiations increased the benefits available under both the pension and LIB components of the P&I Agreement and, concomitantly, expanded the pool of employees eligible to receive the more valuable immediate retirement benefits (instead of LIB). Pet. App. at 26a; *see also* J.A. 1302-06, 1324-27, 1344-46, 1598-99, 1696, 1704, 1720-21, 1765. For example, in 1973, they agreed that, in the event of a plant closing,

[3] Westinghouse has also provided its terminated management personnel with either immediate retirement or deferred pension and severance benefits under a program that largely parallels the collectively-bargained benefit program. Pet. App. at 10a-11a, 13a.

affected employees could apply for and receive "early" retirement benefits if they were between 55 and 60 years of age and had at least 10 years of service (*see* J.A. 1704); and, in 1979, they agreed that, in the event of a job movement or product line relocation as well, affected employees who satisfied certain liberalized age and service requirements could also receive these immediate early retirement benefits. J.A. 1599-1600. Throughout this period, however, the P&I Agreement continued to provide that employees who became eligible for the more valuable retirement benefits could not receive the less valuable LIB as well. *See* J.A. 1302, 1324, 1344, 1363.

In 1982, Westinghouse and its unions decided to give all retirement-eligible employees who were terminated through no fault of their own the option to elect deferred retirement benefits and LIB. But, in doing so, they once again made clear in both the pension and LIB components of the P&I Agreement that this was an "either-or" option —that is, that employees could choose immediate retirement benefits or deferred retirement benefits and LIB, but not both. Pet. App. at 12a-13a; *see also* J.A. 1272-80, 1549-50.

2. In November 1983, the Equal Employment Opportunity Commission ("EEOC") filed its complaint in this action. J.A. 15-20. In the complaint, as amended, the EEOC alleged, *inter alia*, that Westinghouse had "willfully" violated the ADEA by failing to pay LIB to involuntarily terminated individuals who had received immediate, lifetime retirement benefits. J.A. 16-17, 26-27, 39-40.

The district court agreed with the EEOC, concluding that Westinghouse's "denial of severance pay to employees who take retirement is age-based discrimination." Pet. App. at 85a. In so concluding, the district court determined that Westinghouse could not justify its actions based on its policy of providing employees with only one

post-employment income stream; in the court's view, pension and severance benefits "are distinct benefits with different purposes" and cannot be interchanged. *Id.* at 87a. It further concluded that the "bona-fide employee benefit plan" exemption of ADEA § 4(f)(2) did not protect Westinghouse's actions (*id.* at 91a), and that Westinghouse's violations of the ADEA were "willful." *Id.* at 97a.

3. Westinghouse appealed the district court's decision. The Third Circuit affirmed in part, reversed in part, and remanded for further proceedings. Pet. App. at 1a-36a.

The Third Circuit first ruled that, by conditioning receipt of LIB on ineligibility for or election not to receive immediate retirement benefits, Westinghouse had treated older employees unfavorably because of their age in violation of § 4(a)(1) of the ADEA. Pet. App. at 16a. In so ruling, the court found that older employees had received only immediate retirement benefits, whereas younger employees had received "both severance pay and retirement benefits (when they reached the required age)." *Id.* at 16a-17a. For this reason, the court concluded that "older employees were treated less favorably than younger employees despite the fact that the actuarial value of early retirement benefits may be equal to or greater than the actuarial value" of LIB and deferred pension benefits. *Id.* at 17a. And the court found that this adverse treatment was based on age, since "retirement eligibility," the condition leading to the denial of LIB, is "inexorably linked with age." *Id.* at 19a.

The court next ruled that Westinghouse could not justify the denial of LIB by the fact that the P&I Agreement provides more valuable immediate retirement benefits to older employees. Pet. App. at 20a. It reasoned that "severance pay and pension benefits have distinctly different purposes" and, therefore, that "pension benefits [cannot be] a substitute for severance pay." *Id.* at 20a.

The court further held that "Westinghouse's severance pay and pension plans are not exempt under [§ 4(f)(2) of the ADEA]." Pet. App. at 29a. It found that the LIB and pension provisions in issue were "not integral components of a comprehensive employee benefits scheme," reiterating its earlier conclusion that "severance pay is a fringe benefit for which vested early or selected retirement benefits cannot be a substitute." *Id.* at 26a. The court also held that the challenged components of the P&I Agreement could not themselves qualify for § 4(f)(2)'s protection, since they did not "involve age-related cost factors." *Id.* at 27a.

Finally, the court reversed the district court's judgment that Westinghouse had "willfully" violated the ADEA and remanded for further proceedings. Pet. App. at 36a.

REASONS FOR GRANTING THE WRIT

I. THE THIRD CIRCUIT'S DECISION THAT § 4(a)(1) OF THE ADEA PROHIBITS BARGAINING REPRESENTATIVES FOR EMPLOYERS AND UNIONS FROM ESTABLISHING A POST-EMPLOYMENT BENEFIT PROGRAM THAT PROVIDES RETIREMENT-ELIGIBLE EMPLOYEES WITH EITHER IMMEDIATE RETIREMENT OR SEVERANCE BENEFITS, BUT NOT BOTH, PRESENTS AN IMPORTANT QUESTION OF FEDERAL LAW THAT THIS COURT SHOULD RESOLVE

This case presents an issue of federal law that this Court has not decided, but should decide, because of its vital importance and broad applicability to both public and private employers: that is, whether § 4(a)(1) of the ADEA prohibits an employer and its union from establishing a multi-component post-employment benefit package that provides retirement-eligible employees with either more valuable immediate retirement benefits or less valuable severance benefits, but not both, upon their termination from employment. The court below held that it

does. Because this conclusion threatens a severe disruption of settled compensation practices in this country and lacks any sound basis in the ADEA, the Court's review is necessary.

That the Third Circuit's decision effects a dramatic disruption of current benefit practices is obvious from the fact that Westinghouse's benefit program is not unique. Approximately 24 percent of the private collectively-bargained severance pay plans in this country deny severance benefits to employees if they are eligible for pensions. *See Basic Patterns: Income Maintenance*, Collective Bargaining Negot. & Cont. (BNA) No. 1144, at 53:3 (April 6, 1989); *see also Compensation: Special Pay Practices*, BNA Policy & Prac. Series No. 989, at 331:734 (March 1987) (survey of 112 responding organizations showed that "[e]mployees who retire without pension benefits and those who receive pensions upon retirement are paid severance benefits at 6 percent and 7 percent, respectively, of the firms with formal severance plans"); *Indus. Rel. Guide* (P-H) ¶ 53,458 (1986) (to prevent abuse of severance pay plans, employers often insist on certain safeguards, e.g., provisions that "[s]everance pay is not payable if an employee retires on pension"). In addition, plans with such restrictions have evolved in a wide variety of industries: indeed, the EEOC has already litigated the lawfulness of various kinds of severance and retirement benefit programs in the dairy, rubber, grocery, and steel industries;[4] it has initiated challenges to, and is currently litigating the lawfulness of, similar plans in the communications, meat packing, food, auto-

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[4] *See EEOC v. Borden's, Inc.*, 724 F.2d 1390 (9th Cir. 1984); *EEOC v. USX Corp.*, 10 Employee Benefit Cas. (BNA) 2341 (E.D. Pa. Mar. 23, 1989); *EEOC v. Firestone Tire & Rubber Co.*, 650 F. Supp. 1561 (W.D. Tenn. 1987); *EEOC v. Babcock & Wilcox Co.*, 43 Fair Empl. Prac. Cas. (BNA) 736 (E.D.N.C. 1987); *EEOC v. Great Atlantic & Pacific Tea Co.*, 618 F. Supp. 115 (N.D. Ohio 1985).

motive, electrical and petroleum industries.[5] Thus, the Third Circuit's legal analysis, if applied generally, will destabilize negotiated benefit programs in many industries nationwide. Moreover, that analysis may likewise be used to disrupt various public sector retirement plans and programs impacting thousands of public sector employees.

Nothing in the ADEA mandates such a wholesale invalidation of these collectively-bargained benefit programs. Section 4(a)(1) of the ADEA only prohibits an employer from providing less "compensation" to an individual because of his age. *See* 29 U.S.C. § 623(a)(1). It does not prohibit an employer from providing equal or greater "compensation" to that individual through an integrated benefit package that distributes different types of benefits to different persons. And it does not single out pensions for special treatment or preclude parties from linking them to severance or other benefits in an integrated benefit package. *See, e.g., Britt v. E.I. DuPont de Nemours & Co.*, 768 F.2d 593 (4th Cir. 1985); *Parker v. Federal Nat'l Mortgage Ass'n*, 741 F.2d 975 (7th Cir. 1984); *Abenante v. Fulflex, Inc.*, 701 F. Supp. 296 (D.R.I. 1988), *appeal pending*, No. 87-0456-B (1st Cir.); *Khan v. Grotnes Metalforming Sys., Inc.*, 679 F. Supp. 751 (N.D. Ill. 1988).

Nor is there any reason to read into the ADEA's language, as the Third Circuit did, a limitation that Congress itself did not intend. Because benefit programs established both before and after passage of the ADEA frequently linked pension and severance benefits, Congress

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[5] *See EEOC Summary of Age Discrimination Lawsuits Filed in FY 1988, Daily Labor Report*, No. 251, at D-1 (Dec. 30, 1988); *Report on the Operations of the Office of General Counsel, Equal Employment Opportunity Commission*, October 1986 through September 1987, at Appendix C (July 11, 1988); *Report on the Operations of the Office of General Counsel, Equal Employment Opportunity Commission*, October 1985 through September 1986, at Appendix A (Mar. 31, 1987).

has had ample opportunity to invalidate integrated plans in the ADEA or in subsequent amendments. But it has not.[6] Congress has left undisturbed the numerous benefit programs that it enacted for the benefit of federal employees—programs that either deny severance benefits to, or offset those benefits against the pension benefits available to, retirement-eligible employees. *See* 5 U.S.C. § 5595(a)(2)(iv) (1983); 10 U.S.C. § 1186(b)-(c) and 10 U.S.C. § 1174(e), (h) (1983 & Supp. 1986) (officers and enlisted members eligible for voluntary retirement from active military service not entitled to separation pay); *see also* 14 U.S.C. §§ 286(b), 286a(d), and § 327(b) (1983 & Supp. 1986); 33 U.S.C. § 853h(e) (Supp. 1986). And Congress has done nothing to invalidate the well-established benefit practices—practices in which trade-offs of severance and pension benefits were common—in effect when it enacted and amended the ADEA.[7]

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[6] Indeed, the legislative history of the ADEA indicates that Congress did not want to disrupt existing employee benefit plans and that it intended generally to address problems of age discrimination in benefit plans in separate legislation. *See United Air Lines, Inc. v. McMann*, 434 U.S. 192, 195-203 (1977); *see also* 113 Cong. Rec. 7076 (March 16, 1967) (Sen. Javits), *reprinted in EEOC Legislative History of the Age Discrimination in Employment Act of 1967* (1981), at 71.

[7] *See Basic Patterns: Income Maintenance*, Collective Bargaining Negot. & Cont. (BNA) No. 987, at 53:2 (March 31, 1983); *Basic Patterns: Income Maintenance*, Basic Patterns in Union Contracts (BNA), at 35 (9th ed. 1979); *Major Collective Bargaining Agreements: Severance Pay and Layoff Benefit Plans*, U.S. Dept. of Labor, Bulletin No. 1425-2, at 23 (1965); *Dismissal-Pay Provisions in Union Agreements, 1949*, 70 Monthly Lab. Rev. No. 4, at 385 (April 1950); *Employee Benefit Plans Under Collective Bargaining: Employee-Benefit Program of Consolidated Edison*, U.S. Dept. of Labor, Bulletin No. 946, at 18 (1948). Courts historically have recognized and permitted such pension/severance trade-offs both before and after the ADEA's enactment. *See, e.g., Owens v. Press Publishing Co.*, 120 A.2d 442, 446 (N.J. 1956), *citing Ackerson v. Western Union Tel. Co.*, 48 N.W.2d 338, 342 (Minn. 1951)

The Third Circuit's decision thus achieves a result that Congress carefully sought to avoid when it enacted the ADEA. By effectively precluding the exchange of pension and severance benefits within the context of a comprehensive benefit package, the decision below causes widespread disruption of benefit programs that, for decades, have integrated precisely these types of benefits. Because of the decision below, employers, unions, and plan administrators—and ultimately taxpayers where public plans are involved—now face significant potential liabilities to employees who, while receiving substantial benefits (i.e., retirement benefits), have not received all of the benefits that these integrated benefit packages provide (i.e., severance benefits). In the face of such potential liabilities, cautious and prudent employers, unions, and plan administrators, who are intensely concerned with legal certainties and lowest common-denominators, will have to alter their existing benefit programs to ensure that they can satisfy the arbitrary rule of the Third Circuit and courts that might follow it. The net effect, of course, will be fewer severance pay programs, fewer increases in pension entitlements (in order to channel the funds to severance pay and other programs), and a general mismatching of benefit payments with benefit needs. This Court's immediate review is necessary to prevent these serious, unnecessary, and counterproductive disruptions in the provision of employee benefits.

(one of the objectives of severance pay is "'partial compensation for . . . loss of possible pension rights'"); *Antonioli v. Lehigh Coal & Navigation Co.*, 451 F.2d 1171, 1178 (3d Cir. 1971), *cert. denied*, 406 U.S. 906 (1972), *Clemens v. Cent. R.R. Co.*, 399 F.2d 825, 828 (3d Cir. 1968), *cert. denied*, 393 U.S. 1023 (1969), *Roberts v. Lehigh & New England Ry. Co.*, 323 F.2d 219, 224 (3d Cir. 1963) (in these three cases, the Third Circuit held that contracts setting mandatory retirement dates were legal and, therefore, did not unlawfully deprive employees of severance payments).

II. THE THIRD CIRCUIT'S DECISION IS IRRECONCILABLE WITH CONGRESS' AND THIS COURT'S ENDORSEMENT OF CONTRACTUAL FREEDOM IN COLLECTIVE BARGAINING

This Court's review is important for yet another reason: the Third Circuit's decision, which unraveled Westinghouse's collectively-bargained benefit program for purposes of its discrimination analysis, is at odds with this Court's traditional reluctance to interfere with the collective bargaining process. It also imposes severe restrictions on the way employers and unions negotiate collective bargaining agreements; and, more importantly, it seriously disrupts the stability of collectively-bargained retirement programs.

A. The Third Circuit's Failure To Consider The Evolution Of Westinghouse's Benefit Program Through Collective Bargaining Is Inconsistent With The Decisions Of This Court

The National Labor Relations Act ("NLRA" or the "Act"), 29 U.S.C. §§ 141 *et seq.* (1982)—along with numerous public sector collective bargaining acts—imposes a duty on employers and labor organizations or their agents to bargain collectively with respect to wages, hours and other terms and conditions of employment. *See* 29 U.S.C. §§ 158(a)(5), 158(b)(3), 158(d).[8] The Act's legislative history demonstrates that Congress intended to require only that parties negotiate with respect to these "mandatory" subjects. *See* 79 Cong. Rec. 7659 (1935). Congress did not intend to compel agreement. *See* 29 U.S.C. § 158(d). Thus, the NLRA permits the courts

[8] Federal public employees exercise collective bargaining rights under title VII of the Civil Service Reform Act of 1978. 5 U.S.C. §§ 7101-7135 (1982 & Supp. 1987). Many state employees also exercise statutory bargaining rights. *See, e.g.*, Fla. Stat. Ann. §§ 447.201-609 (West 1981 & Supp. 1989); Mass. Gen. Laws Ann. ch. 150E (West 1982 & Supp. 1989); *see generally Developments—Public Employment*, 97 Harv. L. Rev. 1611 (1984).

to demand participation in the collective bargaining process, but not to shape substantive solutions. *See* S. Rep. No. 105, 80th Cong., 1st Sess. 2 (1947) ("[g]overnment decisions should not be substituted for free agreement"); S. Rep. No. 573, 74th Cong., 1st Sess. 12 (1935) ("[t]he committee wishes to dispel any possible false impression that this bill is designed to compel the making of agreements or to permit governmental supervision of their terms").

This Court consistently has endorsed a hands-off policy towards the results of collective bargaining negotiations. *See H.K. Porter Co. v. NLRB*, 397 U.S. 99, 108 (1970). The Court has noted that, although the NLRA commands parties to negotiate with respect to wages, hours, and other terms and conditions of employment, the Act permits the parties lawfully to refuse to yield on these subjects (*see Fibreboard Paper Prod. Corp. v. NLRB*, 379 U.S. 203, 210 (1964); *NLRB v. Borg-Warner Corp.*, 356 U.S. 342, 349 (1958)), and, in more practical terms, to agree to yield subject to trades or concessions from the other party. This Court has declined either to interfere with such deal-making or to review its results. *See California Brewers Ass'n v. Bryant*, 444 U.S. 598, 608 (1980); *NLRB v. Ins. Agents' Int'l Union*, 361 U.S. 477, 488 (1960).

In analyzing discrimination claims, this Court has been similarly reluctant to interfere with the bargains struck by collective bargaining partners. Thus, in *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 79 (1977), the Court held that TWA's refusal to breach a collective bargaining agreement's seniority system to accommodate an employee's religious needs did not violate Title VII. And, in *California Brewers Ass'n v. Bryant*, 444 U.S. at 610, the Court held that a 45-week eligibility requirement for permanent employee status was lawful under Title VII because it constituted a bona fide seniority system. The Court has recognized the need to accommodate the

results of collective bargaining in other cases as well. *See Emporium Capwell Co. v. Western Addition Community Org.*, 420 U.S. 50, 69 (1975) (whether employees' "substantive right[s] to be free of racial discrimination are thought to depend upon Title VII or have an independent source in the NLRA, they cannot be pursued at the expense of the orderly collective-bargaining process contemplated by the NLRA"); *UMWA Health & Retirement Funds v. Robinson*, 455 U.S. 562, 574 (1982) (§ 302(c)(5) does not authorize federal courts to review for reasonableness the provisions of a collective-bargaining agreement allocating health benefits among potential beneficiaries of an employee benefit trust fund).

Contrary to these decisions, the Third Circuit declined to attribute any significance to the collective bargaining process that produced Westinghouse's P&I Agreement. In evaluating whether Westinghouse intentionally discriminated against older workers, the court below declined to consider that, for over two decades, Westinghouse and its unions had negotiated pension and severance benefits together as part of a total economic package. It declined to consider that, in the give-and-take of bargaining, the parties struck a balance that ensured that virtually all employees—regardless of age—received some form of post-employment income security. And it declined to consider that, in those negotiations, Westinghouse and its unions attempted to ensure that older workers fared better than their younger counterparts when their employment at Westinghouse ended.[9]

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[9] The Third Circuit's refusal to acknowledge Westinghouse's P&I Agreement as a product of collective bargaining is particularly egregious in light of its holding that Westinghouse may have "willfully" violated the ADEA. In *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 128 (1985), this Court held that a violation of the ADEA is willful only if "the employer either knew or showed reckless disregard for the matter of whether its conduct was prohibited by the ADEA." In holding that TWA did not act in "reckless disregard," the Court pointed out that the airline had obliga-

To hold, as the Third Circuit does, that Westinghouse engaged in intentional age discrimination thus denigrates the historical and legitimate bargaining that produced a benefit program that actually favors older workers. To be sure, if Congress had clearly intended to prohibit benefit programs such as Westinghouse's P&I Agreement, the fact that the program evolved through collective bargaining would serve as no justification. *See Thurston*, 469 U.S. at 121; *Corning Glass Works v. Brennan*, 417 U.S. 188, 208-10 (1974); *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 50 (1974). But Congress has expressed no such intent in the ADEA (*see* discussion *supra* at 8-10). Because the Third Circuit's decision thus failed without warrant to analyze Westinghouse's program in the context in which the parties negotiated it—and intended it to operate—the Court should grant review.

B. The Decision Below Interferes With The Lawful Trading Of Benefits In Collective Bargaining

The Third Circuit's decision also undermines the NLRA's vision and this Court's endorsement of free collective bargaining among competing parties. Relying on *per se* assumptions as to the nature and purposes of pension and severance benefits (*see* Pet. App. at 17a, 19a, 20a), the court below erected a blanket prohibition against exchanges or linkages of these benefits in any comprehensive benefit package. Because the NLRA does not countenance such a prohibition and, in fact, encourages flexibility in negotiations involving such benefits, the Court should review the decision below.

1. The court below ignored that, as mandatory subjects of collective bargaining, pension benefits and severance benefits are peculiarly suited to the give-and-take of collective bargaining. *See Inland Steel Co. v. NLRB*,

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tions under a collective bargaining agreement that limited its ability to focus on each provision's strict compliance with the letter of the ADEA. *Id.* at 130.

170 F.2d 247, 251 (7th Cir. 1948), *cert. denied*, 336 U.S. 960 (1949); *NLRB v. Royal Plating & Polishing Co.*, 350 F.2d 191, 196 (3d Cir. 1965). Indeed, this Court has stated that "fringe benefits . . . . have long been regarded as matters peculiarly suitable for resolution within the collective bargaining framework, and industrial experience demonstrates that collective negotiation has been highly successful in achieving peaceful accommodation of the conflicting interests." *Fibreboard*, 379 U.S. at 213-14. Thus, this Court and the lower courts have ratified both pension benefits' and severance benefits' use in the trades, compromises and set-offs characteristic of collective bargaining.[19]

The status of pension and severance benefits as "cost" items only underscores their suitability to trading and compromise through collective bargaining. "[C]ollective bargaining proposals directly susceptible to monetary evaluation, such as wages, vacations, holidays, and pension and welfare contributions" are traditionally analyzed as cost items. *See* Hart, *Techniques of Collective Bargaining*, 26 Prac. Law. No. 1 9, 17 (Jan. 15, 1980); Katz, *Discussion—Do Contract Rights Vest?* Nat'l Acad. Arb. (16th) (BNA) 223, 224 (1963). As such, parties typically bargain for them within pre-set cost caps. *See Bugas, The Ford-UAW Negotiations of 1958*, Nat'l Acad. Arb. (12th) (BNA) 98, 101 (1959) ("every employee benefit has a cost, and . . . failure to control costs can

[19] Commentators have remarked on the essential role that compromises and trade-offs play in collective bargaining negotiations. *See* Ryder, *Strategy in Collective Bargaining Negotiations*, 7 Lab. L.J. No. 6 353, 358 (1956); *cf.* Cox and Dunlop, *Regulation of Collective Bargaining By The National Labor Relations Board*, 63 Harv. L. Rev. 389, 427 (1950) ("[e]xperience shows that when conflicts have arisen over pensions, merit increases, the letting of subcontracts, shift schedules, work loads and work assignments, and countless other subjects, the negotiators have exercised unlimited ingenuity in finding acceptable compromises on both substance and procedure").

make the purported benefits illusory"). And they typically bargain for these items in the context of a total economic package. M. Granof, *How to Cost Your Labor Contract* 19 (1973) ("[t]otal contract cost is one of the major restrictions established by top management").[11] As long as certain cost items remain outstanding, the entire package is subject to reshuffling through further trades, compromises or set-offs. *See D.* Rothschild, *Collective Bargaining and Labor Arbitration*, at 91; Hart, *Techniques of Collective Bargaining*, 26 Prac. Law. at 18.

Pension benefits and severance benefits, as both mandatory subjects of collective bargaining and cost items, are therefore commonly-traded items in this system of compromise. *See* discussion *supra* at 14-16. As cost items, they are necessarily related to all other cost proposals and therefore to each other. In their dual status as "cost" items and "mandatory subjects," they are susceptible to use as bargaining chips and, as such, are common subjects of deal-making. Finally, because an employer's obligation to provide pension and severance payments is often triggered by the same event—namely, employee terminations—the two benefits are most peculiarly suited to compromises and set-offs against each other. *See, e.g., Teamsters Local Union No. 688 v. NLRB*, 756 F.2d 659, 661 (8th Cir. 1985).

The Third Circuit's conclusion that these benefits cannot, under the ADEA, be so traded, disregards the lawful collective bargaining practices fomenting pension/

[11] *See also* D. Rothschild, L. Merrifield & H. Edwards, *Collective Bargaining and Labor Arbitration* 135 (2d ed. 1979), *citing* H. Davey, *Contemporary Collective Bargaining* 111-12 (2d ed. 1959) ("[u]se of the basket approach on economic issues is recommended"); Hart, *Techniques of Collective Bargaining*, 26 Prac. Law at 18 ("[p]referably, all the economic items should be presented together, with the understanding that the 'package' is a single proposal"); *Borg-Warner Corp.*, 356 U.S. at 347 ("[t]he company submitted a 'package' proposal covering economic issues").

severance linkages. Moreover, the court's hastily-concocted *per se* assumption that the two benefits serve "distinctly different purposes," Pet. App. at 20a, effectively seals pensions off from all compromise and economic pressure. No other mandatory subject of bargaining is subject to such strictures. Nor should it be. The decision below thus seriously undermines the free collective bargaining that Congress and this Court have endorsed.

2. The decision below also places an artificial, prospective restriction on the negotiating freedom traditionally afforded collective bargaining representatives. By essentially removing a major cost item—here pension benefits—from the field of potential bargaining chips, the court has severely limited the bargaining discretion of the majority-selected representative. That limitation is contrary to this Court's repeated confirmation of the wide-ranging powers of such exclusive bargaining agents (*see Ford Motor Co. v. Huffman*, 345 U.S. 330, 338 (1953)) and its contextual approach to accommodating minority rights within the NLRA's predominantly majoritarian collective bargaining framework.

In enacting § 9(a) of the NLRA, 29 U.S.C. § 159(a), "Congress sought to secure to all members of the unit the benefits of their collective strength and bargaining power, in full awareness that the superior strength of some individuals or groups might be subordinated to the interest of the majority." *Emporium Capwell Co.*, 420 U.S. at 62; *see also Steele v. Louisville & Nashville R.R. Co.*, 323 U.S. 192, 202 (1944). While this Court historically has sought to preserve bargaining unit members' collective strength, it has, concomitantly, imposed on exclusive bargaining representatives an obligation to serve the interests of all unit members without hostility or discrimination toward any, to exercise their discretion with complete good faith and honesty, and to avoid arbitrary conduct. *See Vaca v. Sipes*, 386 U.S. 171, 177 (1967); *Humphrey v. Moore*, 375 U.S. 335, 342 (1964).

The Court traditionally has interpreted this "duty of fair representation" in a manner that protects minority interests. It has done so, however, without ignoring the practical constraints of collective negotiations or the necessity for binding majority rule. The Court has stated that "[a]ny authority to negotiate derives its principal strength from a delegation to the negotiators of a discretion to make such concessions and accept such advantages as, in light of all relevant considerations, they believe will best serve the interests of the parties represented." *Huffman*, 345 U.S. at 337-38. Thus, the Court has recognized that "differences arise in the manner and degree to which the terms of any negotiated agreement affect individual employees and classes of employees" (*id.* at 338), but has refused to "find a breach of the collective bargaining agent's duty of fair representation in taking a good faith position contrary to that of some individuals whom it represents . . . [or] in supporting the position of one group of employees against that of another." *Humphrey*, 375 U.S. at 349.

The decisions of the lower federal courts illustrate the extent to which bargaining representatives can enjoy significant negotiating freedom as to employee benefits without violating their duties of fair representation. In *Chesser v. Babcock & Wilcox*, 753 F.2d 1570, 1573 (11th Cir.), *cert. denied sub nom. Sims v. Babcock & Wilcox Co.*, 474 U.S. 836 (1985), for example, the Eleventh Circuit held that a union was not required to insist on extra pension benefits for certain employees at the expense of frustrating the desires of a majority of the members for severance pay. Other federal courts have upheld similar bargains against duty of fair representation challenges. *See Hendricks v. Airline Pilots Ass'n, Int'l*, 696 F.2d 673, 677 (9th Cir. 1983) (no breach of duty of fair representation when union confiscated one group's right to exchange vacation days for compensation in favor of and directly to the economic benefit of another group subject

to a potential layoff); *Williams v. Pacific Maritime Ass'n*, 617 F.2d 1321, 1330 (9th Cir. 1980), *cert. denied*, 449 U.S. 1101 (1981) (law of fair representation clearly permits a union to negotiate for an agreed-to contract provision awarding greater benefits to fully registered workers than to provisional workers); *Buchholtz v. Swift & Co.*, 609 F.2d 317, 319 (8th Cir. 1979), *cert. denied*, 444 U.S. 1018 (1980) (no breach of duty of fair representation when union withdrew vacation pay claim of some former employees in order to obtain pension benefits for others).

The Third Circuit's decision stands in direct contrast to these courts' careful balancing of individual and collective rights and places a prior restraint on the negotiating freedom of collective bargaining representatives. The Third Circuit's decision effectively forecloses a union representative from agreeing to any integrated benefits program involving a trade-off of pension and severance benefits (or, for that matter, pensions and any other benefit). It does so regardless of the plan's history, the industry involved, the employee interests at stake, or the representative's motives for negotiating such a plan. Such a prospective limitation is in serious tension with the NLRA's exclusive representation scheme.

It is also in serious tension with the purposes underlying the ADEA. One of the ADEA's express purposes is "to help employers and workers find ways of meeting problems arising from the impact of age on employment." 29 U.S.C. § 621(b). The legislative history makes clear that, in formulating this purpose, Congress recognized that older and younger workers have different qualifications and face different pre- and post-employment problems. *See generally The Older American Worker: Age Discrimination in Employment, Report of the Secretary of Labor to the Congress Under Section 715 of the Civil Rights Act of 1964 (1965), reprinted in EEOC Legislative History of the Age Discrimination in Employment*

Act of 1967 (1981), at 11-17. It thus intended to encourage, rather than discourage, employers and the representatives of their employees to work out solutions to these different problems and to implement programs tailored to the special needs of older and younger workers. Because the Third Circuit's decision invalidates precisely such a program—one that Westinghouse and its unions designed to address the special post-employment needs of older workers—and therefore contravenes one of the ADEA's express purposes, this Court should grant review.

CONCLUSION

The Court should grant the Petition.

Respectfully submitted,

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